IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~61~~ 69-4

JOSEPH ARTHUR ZICARELLI,

Appellant,

—v.—

NEW JERSEY STATE COMMISSION OF INVESTIGATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. ~~565~~ 70-7

ALBERT SARNO and CHRIS CARDI,

Petitioners,

—v.—

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

ON CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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Authorities Cited

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Interest of *Amicus**

The American Civil Liberties Union is a nationwide, nonpartisan organization engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been particularly concerned with those societal values embodied in the Fifth Amendment's Privilege Against Self-Incrimination.

The Fifth Amendment Privilege plays a central role in our accusatorial system of justice. It safeguards the individual against overbearing inquiries by the State. Yet, as reflected in these cases, it is once again under attack by legislatures and the courts.

The purpose of this brief is to identify the policies underlying the Privilege and to demonstrate that the requirement of full transactional immunity is the minimally tolerable erosion of the fundamental right of silence protected by the privilege.

Question Presented

This brief is addressed solely to the question of whether the privilege against self-incrimination requires that the State grant full transactional immunity before it can compel a witness to testify.

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* Letters of consent to the filing of this brief from the attorneys for the respective parties have been filed with the Clerk.

ARGUMENT

Summary of Argument

The Fifth Amendment was intended and has been construed to confer an absolute right to remain silent when subjected to incriminating inquiries. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In this respect, the values protected by the Fifth Amendment dovetail with the right of privacy embodied in the Fourth Amendment, as this Court recognized almost a century ago in *Boyd* v. *United States*, 116 U.S. 616 (1886). Together these guarantees afford a private enclave into which the state may not intrude, physically or inquisitorially. Accordingly, *any* legislative arrangement by which a man is compelled to speak is constitutionally suspect. The validity of any immunity statute must be judged against these premises.

In *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) this Court held that only complete transactional immunity is an adequate displacement of the right to remain silent. *Counselman* embodied a studied compromise between the theory that no device could be used to compel self-incrimination and the uncertainties of "use" immunity schemes. Since *Counselman*, transactional immunity has been held to be part of our "constitutional fabric" as the minimally acceptable erosion of the Privilege. Those Justices who opposed the *Counselman* Rule did so not because it afforded too much, but because it granted too little to compensate for compelled self-incrimination. See *Brown* v. *Walker*, 161 U.S. 591 (1896); *Ullmann* v. *United States*, 350 U.S. 422 (1956).

This Court's decision in *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) is not a retreat from the *Counsel-*

man rule. *Murphy* was an *expansion* of Fifth Amendment protection, holding that one sovereign could make no use whatsoever of testimony compelled by another. *Murphy* did not disturb the settled rule that as between a witness and the sovereign which forces him to relinquish his privilege, complete transactional immunity is required. See *Stevens* v. *Marks*, 383 U.S. 234 (1965); *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). Finally, anything less than full transactional immunity places too great a practical burden on the witness to insure that any future prosecution was not based on tainted evidence.

I.

Constitutional framework: The Fifth Amendment privilege safeguards the right to remain silent.

We begin our analysis of the issue in these cases by suggesting to the Court that the Fifth Amendment has always been thought to afford individuals the cherished right to remain silent. Accordingly, *any* device, be it immunity statute or truncheon, which operates to breach that silence and compel a man to confess criminal conduct runs afoul of the purpose of the constitutional privilege and impairs the societal policies which that privilege seeks to further.

As this Court has noted many times, the privilege was incorporated into the Constitution at a time when the oath *ex officio* utilized by England's Star Chamber and High Commission was recent history. John Lilburn's historic battle against such oaths led to their repeal in England.

The Fifth Amendment privilege was intended to have the same effect here. It was designed to safeguard a man's right to resist compulsion applied in an attempt to force him to reveal past criminal conduct. See, *Miranda* v. *Arizona*, 384 U.S. 436, 458-60 (1966). And the inquiries were usually directed at the "crimes" of political or theological dissent. In effect, the privilege was intended to prevent the state from rummaging through the closets of the mind in search of the secrets contained therein.

In this respect, the values safeguarded by the Fifth Amendment privilege dovetail with those protected by the Fourth Amendment and together provide a right of privacy against governmental intrusion. The intimate relationship between these two constitutional safeguards was clearly enunciated almost a century ago in *Boyd* v. *United States*, 116 U.S. 616 (1886). The case involved a statute designed to compel the production of incriminating documents, and the defendant objected on both Fourth and Fifth Amendment grounds. Both claims were sustained. This Court quoted at great length from the historic English decision in *Entick* v. *Carrington*, 19 How. St. Tr. 1029. Lord Camden had surveyed the principles of the common law and concluded: "[i]t is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle." (Quoted in *Boyd* v. *United States*, *supra*, at 629) The Court summed up these principles in the following manner,

> The principles laid down in this opinion affect the very essence of constitutional liberty and security.

> They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. *Id.* at 630.

The Court concluded that "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Id.* at 631-32.

This recognition, that the Fourth and Fifth Amendments and the interests they protect "run almost into each other"

and prevent extorting a man's oath, has been repeatedly reflected in the Court's decisions. For example, in *Malloy* v. *Hogan*, 378 U.S. 1 (1964) the Court concluded that the constitutional privilege guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Id.* at 8. The history of the privilege and the policies it serves was eloquently characterized by Chief Justice Warren,

> Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." United States v. Grunewald, 233 F2d 556, 579, 581-582 (Frank, J., dissenting), rev'd, 353 US 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, Murphy v. Waterfront Comm'n, 378 US 52, 55-57, note 5 (1964); Tehan v. Shott, 382 US 406, 414-415, note 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev 1961), to respect the inviolability of the human personality, our accusa-

tory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. Chambers v. Florida, 309 US 227, 235-238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); *Miranda* v. *Arizona, supra* at 460.

II.

Full transactional immunity is the minimally acceptable substitute for the Fifth Amendment privilege to remain silent.

We have set forth this analysis of the purposes of the Fifth Amendment privilege because any immunity statute must be evaluated against the premise that the privilege safeguards personal privacy and the right to remain silent. Since this Court first considered the validity of immunity statutes in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), there have been essentially two theories competing for acceptance. One theory holds that *no* immunity statute is constitutionally sufficient to displace the privilege and compel a man to speak. This view was enunciated in 1807 by Mr. Chief Justice Marshall, almost commanded a majority in *Brown* v. *Walker*, 161 U.S. 591 (1896), and was articulated by Justice Douglas, joined by Justice Black in *Ullmann* v. *United States*, 350 U.S. 422 (1956).

This absolute position (with which we fully concur) has not prevailed. Instead, this Court has adopted the rule that a grant of immunity from prosecution is the minimally acceptable substitute for the privilege. However, the doctrinal tension has always been between the minority view, that the privilege and its underlying policies affords the complete right to silence, and the prevailing view that statutes which grant transactional immunity are sufficient. Thus, the debate has always been between silence and transactional immunity, not between transactional immunity and something less. The transactional immunity rule has prevailed not over the argument that it afforded too much protection, but over the objection that it gave too little.

A. *Historical Background—The pre-*Counselman *Understanding.*

The view that the Fifth Amendment privilege affords an absolute right of silence with regard to incriminating inquiries is supported by the language of the privilege and the history of its origins. Justice Brennan has surveyed the history as follows,

> Historians have noted that the clause itself is absolute and may not originally have been viewed as allowing the government to compel men to incriminate themselves if it only promised not to prosecute them for the crimes revealed:
>
> "The clause by its terms also protected against more than just 'self-incrimination,' a phrase that had never been used in the long history of its origins and development. The 'right against self-incrimination' is short-hand gloss of modern origin that implies a re-

striction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him.

* * * * * *

"The state courts of the framers' generation followed the extension of the right to cover self-infamy as well as self-incrimination, although the self-infamy rule eventually fell into disuse." L. Levy, Origins of the Fifth Amendment, 427, 429 (1968). *Piccirillo v. New York*, 27 L. Ed. 2d 596, 606 n. 7 (1971) (dissenting opinion).

The purpose of the privilege, as reflected in its absolute language, was to guarantee that one need not speak at all concerning incriminating or infamous matters. This understanding is manifest in Mr. Chief Justice Marshall's decision in the trial of Aaron Burr,

> . . . It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it might be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compelled to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

> What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that might form a necessary and essential part of a crime, which is punishable by the laws . . .
>
> [I]n such a case, the witness must himself judge what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer. 1 *Burr's Trial*, 244-45.

Marshall's view, that the privilege afforded the right not to speak at all concerning incriminating matters, predated the modern immunity statutes, first enacted in 1857. Those resulted in so-called "immunity baths," which allowed witnesses to flock to Congress, confess their past indiscretions, and obtain freedom from prosecution. See Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568, 1571-72 (1963). These statutes were quickly supplanted by restrictive immunity provisions. But those provisions were not utilized for two decades until the passage of the Interstate Commerce Act. *Id.* at 1572-73. Investigations under that Act quickly led to this Court's decision in *Counselman* v. *Hitchcock*, *supra*, unanimously invalidating the immunity statute for not affording protection equivalent to the Fifth Amendment.

B. *Transactional Immunity—The Compromise Between the Right to Absolute Silence and the Uncertainties of "Use" Immunity.*

"[N]o statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States." *Counselman* v. *Hitchcock, supra;* at 585. That was the opinion of this Court when first confonted with the question of the constitutionality of a federal immunity statute.[1]

The statutory provision affording less than complete immunity was held to be constitutionally defective. Writing for a unanimous court, Justice Blatchford announced that "[i]t is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." *Id.* at 585. The Court held that the immunity provision did not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and was not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, "must afford absolute immunity against future prosecution for the offense to which the question relates . . ." *Id.* at 586.

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[1] The statute provided, in part, that:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. Act of Feb. 25, 1868, Rev. Stat. Sec. 860.

Although *Counselman* presented this Court with its first opportunity to examine the constitutionality of an immunity statute, the protection afforded to the witness was not unreasoned nor was it unnecessarily broad. Rather, the *Counselman* decision resulted from a compromise which attempted to balance the rights of the individual and the interests of the government without excessive sacrifice of the policy considerations underlying the privilege against self-incrimination.

The court in *Counselman* considered Chief Justice Marshall's suggestion, in the *Aaron Burr* case, that the privilege against self-incrimination was tantamount to a right to remain silent. Marshall, certainly not one to denigrate the interests of the state, nevertheless concluded that "the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punished by the laws" (quoted in *Counselman* v. *Hitchcock, supra,* at 566). The conclusion to be drawn from Marshall's position was that any compulsion to testify, regardless of the scope of the immunity provided, would erode the right to remain silent.

Antithetical to the Marshall equation, however, was the position that had been adopted by the New York Court of Appeals in *People* v. *Kelly,* 24 N.Y. 74 (1861). *Kelly* involved a New York immunity statute which compelled accomplice testimony but also prohibited the use of that compelled testimony in "any prosecution or proceeding civil or criminal." It was contended that this statute violated a provision of the New York Constitution which declared that "no person shall be compelled, in any criminal case, to be a witness against himself." The New York Court of Appeals upheld the constitutionality of the stat-

ute. The *Kelly* case subsequently served as the progenitor of a line of state decisions which, during the second half of the nineteenth century, validated the constitutionality of "use" immunity statutes.

A third position developed, however, which adopted a "well conceived middle path" between the suggestion that no immunity statute could be constitutionally coextensive with the privilege and the view that a "use" immunity provision could satisfy the requirements of the Fifth Amendment. This middle path was first announced in *Emery's Case,* 107 Mass. 172 (1871), which held that a witness could be compelled to testify but only if "first secured from future liability . . . as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution." *Id.* at 185. This security, the court found, "cannot be accomplished so long as he [the witness] remains liable to prosecution criminally for any matters or causes in respect of which his testimony shall relate." *Ibid.* See also, *Cullen* v. *Comm.,* 24 Gratt 624 (Virginia, 1873) ("before [the constitutional privilege] can be taken away [by the Legislature], there must be absolute indemnity provided, nothing short of complete amnesty to the witness—an absolute wiping out of the offence as to him, so that he could no longer be prosecuted for it—would furnish that indemnity." *Id.* at 635; *State* v. *Nowell,* 58 N.H. 314 (1878) ("[t]he legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection must relieve him of all liabilities on account of the matters which he is compelled to disclose; otherwise, the statute would be ineffectual. He is to be secured against all liability to future prosecution as effectually as if he were wholly innocent.

This would not be accomplished if he were left liable to prosecution criminally for any matter in respect of which he might be required to testify." *Id.* at 315).

In adopting the doctrine represented by *Emery's Case,* that full prosecutorial immunity must be conferred, this Court was prompted substantially by the need to reconcile the constitutional validation of any immunity statute with the position adopted a few years earlier in *Boyd* v. *United States, supra. Boyd* had revealed the fundamental confluence between the Fourth and Fifth Amendments, demonstrating that they "run almost into each other." *Boyd* showed that both Amendments were essentially designed to protect the privacy and security of the individual from excessive incursions by the government. Justice Blatchford in *Counselman,* quoting extensively from the majority opinion in *Boyd,* was not unmindful of the essential importance of this "indefeasible right of personal security."

In sum, although the Court in *Counselman* attempted to satisfy the state's interest in seeking information, it sought not to sacrifice the individual's right of privacy and security. *Counselman* took the middle path between an unfettered right to remain silent and the substantial erosion of the Fifth Amendment which would have occurred by upholding the validity of use immunity statutes. The *Counselman* "compromise" indicated that immunity statutes would be upheld only so long as they provided full "prosecutorial" protection.

C. *Post-Counselman*: *Transactional Immunity Emerges as the Rule Over Frequent Objections That No Immunity Statute Can Displace the Privilege.*

In response to the constitutional requirements suggested by the opinion in *Counselman*, Congress enacted in 1893 a "transactional" immunity statute. See 27 Stat. at L. 443 (1893).[2] Three years later, a challenge to the validity of this statute reached the Supreme Court in the case of *Brown* v. *Walker*, *supra*. The Court by a narrow 5-4 vote upheld the constitutionality of the transactional immunity provision. Writing for the majority of the court, Justice Brown found that the transactional statute sufficiently protected a witness to satisfy the requirements of the Fifth Amendment. The majority reasoned that the Fifth Amendment privilege was susceptible of two interpretations. First, it could be construed literally to authorize a witness to refuse to incriminate himself. Such an interpretation would, in effect, mean that no one could be compelled to testify to a material fact in a criminal case unless by choice. The other construction would bar any prosecution related to the testimony given, because ". . . if no such prosecution be possible—in other words, if his testimony operate as a complete pardon for the offence to which it relates—a statute absolutely securing him such immunity from prosecution would satisfy the demands of the clause in question." 161 U.S. at 595. The majority concluded that "if the statute does afford . . . immunity against future prosecution the witness will be compellable to testify." *Id.* at 594.

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[2] The statute afforded protection not only against prosecution, but also against the witness being subjected to "a penalty or forfeiture."

Four Justices dissented. They objected to the statute not because it provided protection that was unnecessarily broad, but because the protection afforded by the transactional provision was not broad enough. They concluded that no immunity statute could displace the values protected by the Fifth Amendment.

Justice Shiras, with whom Justices Gray and White joined in dissent, reasoned that various historical and practical considerations undercut any immunity provision:

> It is too obvious to require argument that, when the people of the United States, in the 5th Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his rights thereto should not be devested or impaired by any act of Congress. *Id.* at 610.

He further contended that "the very fact that the founders of our institutions, by making the immunity an express provision of the Constitution, disclosed an intention to protect it from legislative attack, creates a presumption against *any* act professing to dispense with the constitutional privilege." *Id.* at 621.

Shiras found the transactional statute deficient in many respects. First, the enactment did not really protect the witness from prosecution. It merely enabled the witness to plead the prior compulsion as a defense against a subsequent indictment. As Shiras demonstrated, under the statute the witness will have,

> been prosecuted, been compelled, presumably, to furnish bail, and put to the trouble and expense of em-

> ploying counsel and furnishing the evidence to make good his plea. It is no reply to this to say that his condition, in those respects, is no worse than that of any other innocent man who may be wrongfully charged. The latter has not been compelled, on penalty of fine and imprisonment, to disclose under oath facts which have furnished a clue to the offense with which he is charged. 161 U.S. at 621-22.

Secondly, it is not "a matter of perfect assurance that a person who has compulsorily testified . . . will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design." *Id.* at 622. In addition, Shiras contended that under the statute, the witness is relinquishing his privilege of silence in exchange for which, by testifying, "he is subjected to the hazard of a charge of perjury." *Ibid.* Finally, Justice Shiras argued that the statute was deficient because "the effect of the provision . . . as a protection to the witness, is purely conjectural and uncertain." *Id.* at 627. Thus Shiras concluded that the transactional immunity statute did not fully supplant the right to remain silent. For it did not leave the witness in the same position as if he had never testified. According to the dissenting votes in *Brown* v. *Walker,* the transactional statute constituted an unconstitutional erosion of the Fifth Amendment.

While Justice Shiras attacked the practical sufficiency of immunity statutes, Justice Field in a separate dissenting

opinion adopted the position that no immunity statute, however broad in scope or closely drawn, could supplant the right against self-incrimination. According to Field, the Fifth Amendment was intended to afford to the witness "a shield of absolute silence." And, said Field, "[n]o different protection from that afforded by the amendment can be substituted in place of it." *Id.* at 630. Field further contended that "[t]he amendment also protects [the witness] from all compulsory testimony which would expose him to infamy and disgrace, though the facts might not lead to criminal prosecution." *Id.* at 631. Certainly no statute could sufficiently immunize an individual from the "essential and inherent cruelty of compelling a man to expose his own guilt" and from public disapprobation once that person has admitted to the commission of an illegal or immoral act. Field therefore recurred to a formidable line of authority which contended that no statutory enactment could infringe upon the individual's unfettered right to remain silent and the concomitant right that the individual should suffer no penalty for his silence.

The transactional immunity standard suggested by *Counselman* and solidified by *Brown* v. *Walker* has been consistently reaffirmed as the maximum erosion of the right to remain silent that will be tolerated by the Fifth Amendment.

The issue as to the necessary scope of an immunity statute was raised in *Hale* v. *Henkel*, 201 U.S. 43 (1906). In that case a witness had refused to testify before a grand jury and was therefore cited for contempt. The witness contended that the transactional immunity, under which he was being offered protection, was not sufficiently broad to supplant his privilege. This court, however, upheld the

contempt citation and reasserted the transactional standard promulgated by *Counselman* and by *Brown* v. *Walker*.

Further induration of the *Counselman* rule was accomplished by Justice Brandeis in *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924). Writing for a unanimous court, Brandeis held that Congress could not compel a bankrupt individual to relinquish his Fifth Amendment right to remain silent unless it provided "complete immunity from a prosecution." *Id.* at 42. And in *United States* v. *Murdock*, 284 U.S. 141 at 149 (1931)[3] this court again declared that:

> The principle established is that full and complete immunity against prosecution by the government compelling the witness is equivalent to the protection furnished by the rule against compulsory incrimination. [Citing for support of the above proposition] *Counselman* v. *Hitchcock*, 142 U.S. 547; *Brown* v. *Walker*, 161 U.S. 591; *Jack* v. *Kansas*, 199 U.S. 372; *Hale* v. *Henkel*, 201 U.S. 43.

United States v. *Monia*, 317 U.S. 424 (1943) also presented the Court with the opportunity to review and to reaffirm the *Counselman* rule. Again the Court concluded that *Counselman* "indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege." *Id.* at 428. Even in dissent, Justice Frankfurter reaffirmed the rulings in *Counselman* and in *Brown* v. *Walker*. In discussing the *Brown* decision, Frankfurter conceded that "[t]here was no in-

[3] To the extent that *Murdock* held that fear of state prosecution did not justify a refusal to answer questions in an inquiry by federal officials, that holding was overruled by *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964).

dication of any belief that Congress had given anything more than it had to give—and indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution required." *Id.* at 434. In *Adams* v. *Maryland*, 347 U.S. 179, 182 (1954) Justice Black, delivering the opinion of the Court, stated that: "in *Counselman* v. *Hitchcock* . . . this Court held that an act not providing 'complete' immunity from prosecution was not broad enough to permit a federal grand jury to compel witnesses to give incriminating testimony."

Finally, in *Ullmann* v. *United States*, 350 U.S. 422 (1956), the court was again called upon to deal with the issue of the constitutionality of a transactional immunity provision and to review the line of cases validating such legislation. The statute at issue in *Ullmann* was the Immunity Act of 1954, 68 Stat. 745, 18 U.S.C. (Supp. II) Sec. 3486, which effectively compelled the testimony of a witness, in any case, "involving any interference with . . . the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy . . ."[4]

Justice Frankfurter, writing for a majority of the Court, upheld the constitutionality of the statute and characterized the standard set forth in *Brown* v. *Walker* as "part

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[4] The legislation also provided that:

> [N]o such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

This statute was typical of the federal immunity statutes until the passage of the Organized Crime Control Act of 1970, 18 U.S.C. Secs. 6001-6003.

of our constitutional fabric." Frankfurter discussed the development of the doctrine promulgated in *Brown* v. *Walker*, and he emphatically reasserted the precedential firmness of that ruling:

> . . . in Counselman v. Hitchcock, 142 US 547 a unanimous Court had found constitutionally inadequate the predecessor to the 1893 statute because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony. It was with this background that the 1893 statute, providing complete immunity from prosecution, was passed and that Brown v. Walker was argued and decided. As in Counselman, appellant's numerous arguments were presented by James C. Carter, widely acknowledged as the leader of the American bar. The Court was closely divided in upholding the statute, and the opinions reflect the thoroughness with which the issues were considered. Since that time the Court's holding in Brown v. Walker has never been challenged; the case and the doctrine it announced have consistently and without question been treated as definitive by this Court, in opinions written, among others, by Holmes and Brandeis, JJ. See, e.g., McCarthy v. Arndstein, 266 US 34, 42; Heike v. United States, 227 US 131, 142. The 1893 statute has become part of our constitutional fabric . . . Shapiro v. United States, 335 U.S. 1, 6. Ullmann v. United States, supra, at 436-38.[5]

[5] In a footnote, Justice Frankfurter briefly summarized the arguments of James C. Carter as Carter contended that the transactional immunity statute was inadequate to supplant the right to

Justices Douglas and Black dissented. They advocated adoption of the view of the *Brown* dissenters "that the right of silence created by the Fifth Amendment is beyond the reach of Congress." *Id.* at 440.

After noting that the disabilities imposed upon one forced to reveal the type of information about political associations sought in *Ullmann* were similar, if not more egregious, than the "forfeitures" involved in *Boyd* v. *United States, supra,* Justice Douglas' opinion observes that "[w]isely or not, the Fifth Amendment protects against the compulsory self-accusation of crime without exception or qualification." *Id.* at 443. It does so to interdict three kinds of mischief. The first is the risk of prosecution

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remain silent. That summary of Carter's arguments is recited herein:

> He urged that the statute left the witness in a worse condition because it did not abrogate the crime for which he was given immunity; that the constitutional safeguard goes toward relieving the witness from the danger of an accusation being made against him while the statutory immunity forces him to supply evidence leading to an accusation and provides only a means for defense; that the statute puts a heavy burden on petitioner, if he is indicted, to prove that he had testified concerning the matter for which he was indicted; that a citizen is entitled to the very thing secured to him by the constitutional safeguards and not something which will probably answer the same purpose; that the statute subjects him to the infamy and disgrace from which he was protected by the constitutional safeguard; that the statute did not protect him from prosecution for a state crime; that even if it were so interpreted, Congress had no power to grant such protection; that the immunity granted was too narrow since it only extended to matters concerning which he was called to testify and not to all matters related to the testimony given; that to be able to claim the privilege the witness would virtually have to reveal his crime in order that the court could see that the statute failed to protect him; and finally that the statute was an attempt to exercise the power of pardon which was a power not delegated to Congress. 350 U.S. at 437 fn. 13.

and all the attendant uncertainties and disabilities discussed by Mr. Justice Shiras in *Brown* v. *Walker*. Second, the privilege is "a safeguard of conscience and human dignity and freedom of expression as well." *Id.* at 445. The Framers of the Constitution intended to provide more than just protection against prosecution or conviction; they created a "federally protected right to silence." *Id.* at 446. English and colonial history, commencing with the trial of John Lilburn, gave content to the privilege and demonstrated that one of its "great purposes" was "to prevent any Congress, any court, and any prosecutor from prying open the lips of an accused to make incriminating statements against his will." *Id.* at 448-49. Finally, "this right of silence, this right of the accused to stand mute" is designed to protect against compulsory testimony which would expose the accused to infamy and disgrace, to "practical outlawry". *Id.* at 449-50. Justice Douglas concluded his review of the purposes of the Fifth Amendment privilege as follows:

> The critical point is that the Constitution places the right of silence *beyond the reach of government.* The Fifth Amendment stands between the citizen and his government. *Id.* at 454 (emphasis in original).

The dissent by Justices Douglas and Black represents a persistent and persuasive strain of judicial authority which continues to maintain that even the transactional immunity standard constitutes an excessive and intolerable erosion of the Fifth Amendment.

In sum, from *Counselman* through *Ullmann* there was no authority whatever for the proposition that something less

than full transactional immunity could adequately supplant the Fifth Amendment privilege. Transactional immunity has consistently been regarded as the minimal protection that could be afforded to a witness. To the extent that there was any dissent from the *Counselman* rule, such opposition has traditionally argued that transactional immunity did not provide enough protection. Until *Murphy* v. *Waterfront Commission, supra,* it was never seriously contended that *Counselman* provided too much protection when measured against the Fifth Amendment right to remain silent.

III.

Where one state jurisdiction is involved, transactional immunity is the necessary and proper requirement, and *Murphy* v. *Waterfront Commission* is not to the contrary.

The recent suggestion that the Fifth Amendment only requires the inquiring sovereign to grant use immunity in order to abrogate the witness' privilege is premised on certain language in *Murphy* v. *Waterfront Commission, supra.* See, *Uniformed Sanitation Men's Assn. Inc.* v. *Commissioner of Sanitation,* 426 F.2d 619 (2d Cir. 1970); *Kastigar* v. *United States,* —— F.2d ——, 39 L.W. 2562 (9th Cir. 1971), *cert. granted,* 39 U.S.L.W. 3511. But *Murphy,* properly read, is consistent with the view that as between the witness and a state nothing less than full transactional immunity will satisfy the Fifth Amendment.

In *Murphy,* the inquiring jurisdiction had offered the witness full transactional immunity in exchange for his testimony. The witness protested that under the then-existing rule of dual sovereignty, he was not protected against prosecution by the federal government or by any

Feldman v. *United States,* 322 U.S. 487 (1944); *United* other states: See *Knapp* v. *Schweitzer,* 357 U.S. 371 (1958); *States* v. *Murdock, supra.* Agreeing with the petitioner, this Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. at 79. In so holding, this Court discarded the dual sovereign doctrine. Considerations of federalism had formed the basis of that doctrine: the inapplicability of the Fifth Amendment's right against incrimination to the states, the existence of the "silver platter" doctrine allowing use of evidence unconstitutionally seized by state authorities in a federal criminal trial, the inability of the states to grant immunity from prosecution by either the federal or other state governments, and the need of the federal government and the states for broad powers of investigation to effectively carry out their duties of regulating and preventing crime. See *Jack* v. *Kansas,* 199 U.S. 372 (1905); *Twining* v. *New Jersey,* 211 U.S. 78 (1908); *Feldman* v. *United States, supra; Knapp* v. *Schweitzer, supra;* Note, *In re Koota: The Scope of Immunity Statutes,* 61 Nw. U. L. Rev. 654, 657, n. 5 (1966).

However, once the Court determined in *Elkins* v. *United States,* 364 U.S. 206 (1960), that evidence seized unconstitutionally by state authorities could not be used in federal criminal trials over the defendant's timely objection and in *Malloy* v. *Hogan,* 378 U.S. 1 (1964), that the Fifth Amendment right against self-incrimination was binding on the states, the dual sovereign doctrine lost its theoretical justification. See, Comment, *Self-Incrimination and the*

State: Restriking the Balance, 73 Yale L.J. 1491, 1493 (1964). Therefore, in *Murphy,* the court was faced with the problem of fashioning an immunity rule for the *interjurisdictional* situation which would accommodate those practical considerations of federalism which still remained:

> "Since a state cannot insulate a witness from foreign prosecution by a grant of immunity, the complete abandonment of the dual sovereignty doctrine would prohibit states from constitutionally compelling witnesses to give testimony which might incriminate under laws of other jurisdictions. This could well represent a serious limitation on the state's ability to investigate." Comment, *Self-Incrimination and the State: Restriking the Balance, supra* at 1493.

As Justice White noted in his concurring opinion,

> Whenever access to important testimony is barred by possible state prosecution, the State can, at its option, remove the impediment by a grant of immunity; but if the witness is faced with prosecution by the Federal Government, the State is wholly powerless to extend immunity from prosecution under federal law in order to compel the testimony. *Murphy* v. *Waterfront Commission, supra* at 97.

The problem also remained of allowing the questioning jurisdiction to make prosecutorial decisions for the non-questioning jurisdiction. As has been pointed out:

> . . . A sovereign can make its own self-imposed choice as to whether it is willing to forego subsequent prosecution in exchange for the information obtained. But it is wrong both in principle and practice to permit

one jurisdiction to make this decision for another, which could be the result if complete 'immunity from prosecution' in all jurisdictions were the constitutional result of one jurisdiction's compulsion of testimony. The entire basis of the federal system rests upon the sovereignty theory—that each sovereign should be free to function without restrictions imposed by another sovereign. Note, *In re Koota: The Scope of Immunity Statutes, supra* at 660-661 (1966).

In *Murphy* the Court accommodated these important state and federal interests by fashioning a rule which barred subsequent use in another jurisdiction of the compelled testimony or its fruits. By so doing, the Court was able to preserve the first jurisdiction's right to secure testimony in exchange for a grant of transactional immunity. It also protected the interests of the secondary jurisdiction by allowing it to make its own determination as to whether to prosecute the witness on the basis of independently obtained evidence. The *Murphy* rule, then, governs only interjurisdictional situations by leaving the witness and the noninquiring jurisdiction in the same position as if the witness had never testified. See *Murphy* v. *Waterfront Commission, supra* at 79, 101. *Adams* v. *Maryland,* 347 U.S. 179, 185 (concurring opinion of Justice Jackson). The witness is not subjected to having his testimony or its fruits used by the jurisdiction which did not grant him immunity—a windfall for that jurisdiction—and protects him from being whipsawed between jurisdictions. Furthermore, the nonquestioning jurisdiction is not bound by the decision of the other that it is more valuable to gain information from the witness than to prosecute him.

Consequently, *Murphy* did not *sub silentio* overrule *Counselman* or set forth a rule for intrajurisdictional cases. *In Re Korman*, —— F.2d ——, 39 L.W. 2681 (7th Cir. 5/20/71) (holding *Counselman* is still the rule and invalidating the new federal immunity statute for failing to provide transactional immunity). As has been discussed previously, the rule in *Counselman*, that transactional immunity is required as between the questioning jurisdiction and the witness is of continuing vitality.

Moreover, since *Murphy*, this Court has reaffirmed the *Counselman* rule in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 80 (1965), specifically noting that a federal immunity statute was invalid because it did not provide "absolute immunity against future prosecution for the offense to which the question relates." See also, *Stevens* v. *Marks*, 383 U.S. 234, 244-245, 249-50 (1965) (where this Court found no need to reconsider the *Counselman* rule in regard to the inquiring sovereign).

Accordingly, *Murphy* applies only to situations involving more than one jurisdiction and has no applicability to cases involving only one sovereign:

> *Murphy*, consequently, broadened rather than restricted the protection of the Fifth Amendment's privilege against self-incrimination. The reason the Court extended the protection of the privilege in a cross-jurisdiction situation only to use of the compelled testimony and its fruits and not to prosecution immunity was out of considerations of federalism. Thus it minimized interference with the law enforcement prerogatives of the non-questioning jurisdiction." *In the Matter of the Grand Jury Testimony of Joann Kinoy*, —— F.S. ——, 39 L.W. 2427 (S.D.N.Y. 1971).

There is nothing inconsistent between the *Murphy* exclusionary rule applicable to the intergovernmental situation and the continued vitality of the transactional immunity rule to govern the parameters and the relationship between the witness and the inquiring sovereign. The latter situation is, of course, the one involved here.

The transactional immunity rule reflects a constitutional compromise between the rights of the witness and the law enforcement and investigatory needs of the state. To the extent that the *Murphy* rule suggests that "use and fruits" immunity is the appropriate standard with regard to a non-inquiring secondary sovereign, it is an exception to the transactional immunity rule, an exception based on the realities of federalism and on the realization that although one state must grant transactional immunity, that grant should not bind other states or the federal government. Consequently, if multi-jurisdictional transactional immunity were required, no state could offer it, and thus no state would be able to inquire into incriminating areas. The *Murphy* rule was an understandable reconciliation of the interests involved. And, of course, *Murphy* was an extension of the privilege because it overruled the decisions which held that *no* immunity was required as against the non-inquiring sovereign.

It would be anomalous, indeed, to hold that a decision which extended the availability of the privilege contained the seeds of its destruction. See, *In Re Korman, supra; In the Matter of the Grand Jury Testimony of Joann Kinoy, supra.* It partakes of throwing out the baby with the bath water to suggest that because *Murphy* did not require that transactional immunity be granted by all sover-

eigns, then transactional immunity need not be conferred by any sovereign, even the one that compels the witness to yield his right to remain silent. In the *Murphy* situation, the non-inquiring sovereign has not compelled the witness to reveal criminal activities and to suffer the criminal and other consequences of such a confession, and, so long as an exclusionary rule applies, it can arguably be said that the witness and the non-inquiring sovereign are in the same position as before the question was asked. As Justice Brennan has noted, that is simply not true as between the witness and the sovereign that compels him to speak,

> The individual has been compelled to incriminate himself, and if he is granted only use immunity, compelled to do so in matters for which he may ultimately be prosecuted. Even from the standpoint of the State it clearly is not in the same position that it would have been had it not compelled the witness to testify. It has obviously obtained information, which may help it to pursue its general investigation, as well as its specific investigation of others. Whether that information will enable the investigation to generate enough steam and continue long enough to produce "independent" evidence incriminating the individual originally compelled to testify is an open question. In short, use immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality. *Piccirillo* v. *New York*, 27 L. Ed. 2d at 608-09.

This Court has recognized since *Counselman* that the minimally fair bargain between the inquiring government and the witness is the one embodied in the requirement of

transactional immunity. The individual surrenders his right to remain silent and is forced to reveal criminal conduct. In exchange for withdrawing the constitutional privilege and acquiring evidence, the state is obligated to grant the witness immunity from prosecution for the transaction about which he testified. Anything less than an immunity from prosecution—a pardon—does not comport with the wording, history or policies of the privilege.

Requiring transactional immunity is fair in the practical sense as well. As Justice Brennan has noted, the "uncertainties of the fact-finding process argue strongly against 'use' immunity and in favor of transactional immunity." *Piccirillo* v. *New York, supra* at 609; see also *Murphy* v. *Waterfront Commission, supra* at 703 (concurring opinion of Justice White). Anything less than transactional immunity places a burden on the witness to attempt to insure that any subsequent prosecution relating to the matters testified to was, in fact, based on an independent source. See *In the Matter of the Grand Jury Testimony of Joann Kinoy, supra.* Transactional immunity provides the kind of certainty to which the witness, as well as the court, should be entitled:

> . . . the State may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail fully to perceive its subtleties. A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him. *Stevens* v. *Marks, supra* at 246.

Transactional immunity has been held to be a part of our "constitutional fabric" since *Counselman*. It has been the rule in almost all the states. See Appendix B to Petitioner's Brief in *Piccirillo* v. *New York, supra*. Until very recently, it has been the standard embodied in over forty federal immunity provisions. The minimally acceptable constitutional rule was succinctly stated by Justice Brennan,

> ". . . the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction which compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo* v. *New York, supra* at 605.

CONCLUSION

For the reasons set forth above, the decisions below should be reversed.

Respectfully submitted,

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* Counsel for *amicus curiae* wish to express their appreciation to Arthur N. Eisenberg for his invaluable assistance in the preparation of this brief.